

# **Edward M. Scott v. U.S. General Accounting Office**

**Docket No. 53-701-11-84**

**Date of Decision: October 24, 1985**

**Cite as: Scott v. GAO (10/24/85)**

**Before: Feigenbaum, Presiding Member**

**Reprisal**

**Prohibited Personnel Practices**

**Standing**

**Performance Appraisal**

**Timeliness**

## **DECISION OF THE PRESIDING MEMBER WITH RESPECT TO AGENCY'S MOTION TO DISMISS**

### **Background**

Petitioner Edward M. Scott is a GS-13 Evaluator in the GAO (Agency) Norfolk Regional Office (NRO). He filed a complaint of discrimination with the Agency's Civil Rights Office (CRO) on August 15, 1984, alleging reprisal for testimony he had given in a race discrimination case filed by another NRO employee, Angela McGhee. The claimed reprisal involved the receipt of a low score on one of the eight job dimensions ("Maintaining Effective Working Relationships and Equal Opportunity") under the 1984 Merit Selection Plan (MSP).

Petitioner's complaint also alleged that there was a long-standing pattern of discrimination in the NRO; at least 15 minority employees had been forced out of or had left NRO; only white, Anglo-Saxon, Protestant, North Carolinian males were promoted in the NRO; and the current round of promotions at NRO was fatally flawed. Petitioner asked that he be promoted to GS-14 and that an independent panel (non-GAO) of professional personnel specialists evaluate all GS-12s and 13s in the NRO and that all promotions be stopped or reversed until this is accomplished. The CRO investigated the claim and recommended a final Agency decision of no discrimination, which the Agency adopted on February 14, 1985.

Shortly after filing the complaint with the CRO, Petitioner filed a petition (August 24, 1984) with the Personnel Appeals Board (PAB or Board). The PAB General Counsel informed Petitioner on August 30, 1984, that the petition was premature. On November 21, 1984, more than 80 days after having filed his complaint with the CRO, Petitioner asked the PAB to process his petition.

The allegations contained in the petition were that his rating on each job dimension

...particularly those for DATA GATHERING AND DOCUMENTATION, WRITTEN COMMUNICATION, ORAL COMMUNICATION, ADMINISTRATIVE DUTIES, and MAINTAINING EFFECTIVE WORKING RELATIONSHIPS WITH EEO, were improperly denied, vindictive, in part based on discrimination and are completely judgmental. I also firmly believe and hereby assert that GAO's personnel system: violates nearly all tenets of a professional, sound personnel system in that people performing these functions are not professional personnel specialists or administrators; is based entirely on judgment; and its system of "feedback" and counseling are non-existent. ...

The petition went on to discuss these claims and also alleged that promotions to GS-13 and 14, and placements on best qualified lists, were based on favoritism; that the GAO had turned into a top-heavy, high-graded organization which no longer performs the kind of audits envisioned by the Budget and Accounting Act of 1921; and that reorganizations were over frequent. The relief sought by Petitioner was that: (1) an impartial panel of professional personnel specialists evaluate his ratings and profile and interview him to form a judgment, and (2) that he be promoted to GS-14 at the NRO.

The Board's General Counsel investigated the petition and, on July 2, 1985, notified Petitioner that he had a right to appeal to the PAB. By letter dated July 11, 1985, Petitioner requested a hearing before the Board. In that letter, Petitioner stated that the actions being complained about were:

*Approval by Comptroller General Bowsher of "a Catch-22" promotion assessment system that did not relate to employees' performance and performance ratings,*

*Petitioner's punitive transfer to NRO in 1975 and subsequent blacklisting for whistleblowing,*

*Reprisals by Alfonso Strazzulo (former Regional Manager of NRO) and others for whistleblowing, for filing grievances, and for writing to members of Congress,*

*Reprisals by Ernest Taylor (Assistant Regional Manager, NRO) from 1975 to the present for whistleblowing, filing a grievance, and for making criticisms to Congress,*

*Reprisals by Joe B. Stevens (Assistant Regional Manager, NRO) for whistleblowing and for objecting to certain practices at the NRO,*

*Reprisals by Jack Arnold (Assistant Regional Manager, NRO) and others for Petitioner's deposition supporting Ms. McGhee, and for objections and whistleblowing concerning certain practices at NRO,*

*Failure by Carl Moore (PAB General Counsel) to properly deal with Petitioner's allegation.*

*Failure by Alex Silva (Director, CRO) to properly deal with Petitioner's discrimination complaint.*

The relief sought by Petitioner was overhaul of the present promotion assessment system; use of professional personnel specialists to assess the promotability of GAO personnel; an independent investigation of NRO travel expenditures; transfer of at least three GS-14s and Mr. Taylor to other regional offices; reversal of all NRO promotions from 1983 to present and the remake of those promotions using assessments of promotability made by professional personnel specialists; and Petitioner's immediate promotion at NRO, backdated to his date of transfer, with compound interest.

## AGENCY'S MOTIONS

On August 26, 1985, the Agency filed with the PAB a motion to dismiss Petitioner's claim and, in the alternative, a motion for a more definitive statement from the Petitioner. The motion to dismiss alleges that most of the issues contained in the Petitioner's July 11, 1985, appeal to the PAB are untimely, that they fail to state a claim upon which relief may be granted and that Petitioner does not have standing to raise discrimination issues on behalf of minorities. The motion for a more definitive statement asserts that Petitioner's claims are vague and that, if the Agency's motion to dismiss is denied, the Petitioner should be required to file a more definite statement of his allegations. Each of the Agency's assertions follow.

Untimeliness. A matter in issue must remain the same throughout the entire complaint or appeal resolution procedure. One may not, as the Petitioner has done, file a complaint regarding a matter at one level and then introduce other matters at another level. Petitioner alleged only one issue with the CRO. His letter to the PAB General Counsel alleged additional issues which should have been filed with the CRO, and his July 11, 1985, alleges still more issues. This has rendered most of his complaint untimely (except for the reprisal allegation brought before the CRO). The issues cited in the July 11 letter apparently have not been investigated by the PAB General Counsel and should not be heard by the PAB because the Petitioner did not follow the procedure set forth for the filing of complaints. Some of the Petitioner's complaints are clearly untimely, e.g., his transfer to the NRO in 1975. He has not indicated dates for other alleged reprisals taken against him. It is the Agency's understanding that some of them occurred in 1980 and earlier. Although Petitioner's August 24, 1984<sup>1</sup> complaint is not at issue because it was superseded by the July 11 letter, the Agency notes that his allegation of reprisal on eight job dimensions is not timely because it adds seven job dimensions to the one complained of to the CRO.

No claim for which relief may be granted. Petitioner's complaints in his July 11, 1985, letter essentially allege reprisal for whistleblowing. The taking of a personnel action by management in reprisal against an employee for whistleblowing is a prohibited personnel practice. However, the Petitioner has not alleged that any personnel action, as defined in 5 U.S.C. 2502 (a)(2)(A), has been taken against him for any whistleblowing on his part. Further, it is the Agency's belief that an individual does not have standing to bring allegations of prohibited personnel practices directly before the Board, unless such practices occurred in conjunction with a personnel action otherwise appealable to the Board. It is the Agency's view that in the absence of such a personnel action, allegations of prohibited personnel practices may only be brought before the PAB by the PAB General Counsel.

Petitioner's claims seem more properly within the jurisdiction of the Agency's grievance procedure than they are cognizable by the PAB. The grievance procedure covers such matters as coercion, retaliation, or favoritism in the work situation.

Further, Petitioner has no right to bring claims before the PAB which boil down to the fact he believes the Agency's promotion, appraisal, or any other system, is ill-conceived. The relief sought by Petitioner, except for the promotion he seeks, is not personal to him. They are not the sort of personal relief that an administrative agency is authorized to grant.

The claim against Mr. Moore should be dismissed because the PAB is an independent body separate and apart from the GAO. If Petitioner wants to pursue his allegations regarding the PAB General Counsel's investigation of his complaint, he must do so through some mechanism other than a suit against the GAO. The claim against Mr. Silva should also be dismissed. Petitioner had a right to appeal from the final Agency decision, which he has done, but his dissatisfaction with Mr. Silva's efforts in that regard is not a

separate cause of action before the PAB.

More definitive statement. Petitioner's claim concerning reprisal for whistleblowing sets forth the acts of whistleblowing, but failed to indicate the retaliatory actions allegedly taken against him. Without such information the complaint is confused and the Agency moves that Petitioner be required to state any and all retaliatory action taken against him and when, where, and by whom they occurred. Petitioner should similarly be required to specify each instance of whistleblowing.

## **PETITIONER'S RESPONSE**

Petitioner's response to the Agency's motions is dated September 10, 1985. He states that the Agency's motions contain equivocal and hypothetical language and gross inaccuracies and distortions. Petitioner asserts that the civil rights matter was properly and timely filed with the CRO and that the reprisals for whistleblowing were properly and timely filed with the PAB. He states that his allegations of reprisal involve "punitive transfer, failure to be considered for promotion, etc." beginning in 1975 and continuing to the present, and that his allegations of discrimination involve institutionalized racial and regional bias at the NRO which has had a personal and harmful effect on his promotability. Petitioner asserts there "... are no new charges, just the addition of details, names, places, and events, and the continuing nature of the abject system that obfuscates reprisals for whistleblowing... ."

## **ADDITIONAL RESPONSES**

On October 7, 1985, the Agency filed a reply brief to the Petitioner's response and the Petitioner, on October 16, 1985, responded to the Agency. These documents presented no new material.

## **DISCUSSION AND ANALYSIS**

Under 4 CFR 28.11(a) of the Board's regulations, the PAB will hear cases from GAO employees, or applicants for employment, who claim to be adversely affected by certain GAO actions or inactions. These include adverse actions, prohibited personnel practices and actions involving civil rights discrimination. Individuals may bring allegations of prohibited personnel practices or of discrimination (which is one of the prohibited personnel practices) which do not personally adversely affect them to the attention of the PAB General Counsel, but only the General Counsel may pursue such matters before the Board. Therefore, those allegations by the Petitioner concerning matters which do not personally affect him are hereby dismissed.

In order for a petition for review to be timely it must be filed within 20 calendar days after the effective date of the action complained of, or 20 calendar days after the Petitioner knew or should have known of the action. These time limits may be waived, but only for good cause shown. (4 CFR 28.11(b)).

The timeliness of Petitioner's appeal concerning his rating on the job dimension of "Maintaining Effective Working Relationships and Equal Opportunity" is not challenged by the Agency. With respect to his other claims, which are challenged by the Agency, the Petitioner has given no dates for the actions complained of, except for 1975, which, on its face, is untimely.

There are other serious procedural problems with Petitioner's appeal. An issue of civil rights discrimination, even if timely and personal to the Petitioner, must be processed through the CRO before being appealed to the Board. (4 CFR 28.47). The Petitioner properly appealed his rating on only one job

dimension with the CRO.

A number of Petitioner's claims allege reprisal against him for whistleblowing and objecting to poor management practices. In addition to the question of the timeliness of these allegations, such matters are within the Board's jurisdiction only when the reprisal involves the Agency's taking, or failing to take, a personnel action. In this connection, 5 U.S.C. 2302 (a)(2)(A) defines "personnel action" as:

- (i)an appointment;
- (ii)a promotion;
- (iii)an action under chapter 75 of this title...;
- (iv)a detail, transfer, or reassignment;
- (v)a reinstatement;
- (vi)a restoration;
- (vii)a reemployment;
- (viii)a performance evaluation under chapter 43 of this title ...;
- (ix)a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and
- (x)any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

Except for the claim of punitive transfer, there is no indication by the Petitioner of what personnel actions, if any, were taken against him in reprisal for whistleblowing.

Petitioner's claims concerning Messrs. Moore and Silva are essentially complaints that they have ineffectively dealt with his allegations. The competence of Messrs. Moore and Silva are internal administrative judgments made respectively by the PAB and the GAO; they are not matters the Board will treat in a petition for review. It should also be pointed out that, whether or not there were shortcomings in the work of the CRO and the PAB General Counsel, the fact is that the Petitioner has now arrived at the Board. To the extent that his claims are properly before the Board, he has the opportunity to present his case, either on his own behalf or represented by counsel of his choosing.

## **DECISION**

1. Petitioner's claim concerning his evaluation on the job dimension of "Maintaining Effective Working Relationships and Equal Opportunity" is properly before the Board.
2. Petitioner has no standing to pursue claims concerning matters where he was not personally adversely affected. Any such claims are dismissed.
3. Petitioner has no standing to pursue claims concerning claims of ineffective and/or incompetent treatment of his allegations by Messrs. Moore and Silva. Those claims are dismissed.
4. The Board's procedures require that all matters contained in a petition for review must first be processed through the PAB General Counsel, and those alleging civil rights discrimination must be processed through the CRO and then the General Counsel. Any claims which have not been so pursued are dismissed.

5. Petitioner has 20 days from the date of receipt of this DECISION to furnish the Board with sufficient information to decide whether any matters not covered by paragraphs 1 through 4 should be heard. With respect to each such matter, the Petitioner must indicate:

*the specific management action complained of, i.e., transfer, failure to promote, adverse action, etc.;*

*the date of the action. If the action occurred more than 20 calendar days prior to Petitioner's claim, the Petitioner should indicate those good cause reasons he believes should cause the PAB to waive its timeliness rules;*

*the names and titles of persons responsible for the action; and*

*specific reasons why the Petitioner believes the management action is improper.*

If Petitioner intends to pursue only the one issue of alleged reprisal with respect to the job dimension of "Maintaining Effective Working Relationships and Equal Opportunity," the hearing will commence on November 13, 1985, at 9:30 a.m. in the Board's hearing room. If Petitioner intends to furnish the Board with the information requested in paragraph 5 above, the hearing will be rescheduled. Petitioner should notify the Presiding Member and the GAO of his intention no later than November 1, 1985.

#### **Notes**

1. The Agency's motion erroneously gave the year as 1985.